IN THE

Supreme Court of the United States

October Term, 1965

Nos. 73, 76

THE UNITED STATES OF AMERICA,
Appellant,

v.

GRINNELL CORPORATION, *et al.*

HOLMES ELECTRIC PROTECTIVE COMPANY,
Appellant,

v.

THE UNITED STATES OF AMERICA

On Appeal from the United States District Court
For the District of Rhode Island

REPLY BRIEF FOR HOLMES ELECTRIC PROTECTIVE COMPANY

ARGUMENT

POINT I

The government brief confirms that the district court committed serious error and that no finding of violation of the antitrust laws on the part of Holmes is justified.

We must point out that the government brief in no way really answers Holmes' main brief, which, on detailed analysis of the findings and the record, showed the clear absence of evidence that Holmes violated the antitrust laws (even in the commercially unreal market designated by the district court), that the market so designated was absurdly unsound and that the decree was not only unjust, but was reached in an atmosphere of haste and hostility and through new rules of law (not revealed until after the trial) that are both unwise and unwarranted.

In point of fact, the government now appears to concede or confirm much of what we said. For instance, the government concedes that barring Mr. Fleming from employment by the defendants was unjustified (Brief, pp. 38, 94). Likewise, the government concedes that the broad injunction against violating the antitrust laws in the general language of the statute is contrary to the precedents and improper (Brief, pp. 38, 95). The government brief tells us that the relief selected by the district court was "of such severity" and so "sweeping" in this regard that even the government cannot support it.

More than that, the government brief confirms—by not denying the indisputable fact (contrary to Finding 17 [R 750], one of the many erroneous findings)* that Grinnell supplied nothing to Holmes—that there was no vertical integration between Grinnell and Holmes. In the absence of any vertical connection between Grinnell and Holmes and with Holmes concededly having, even in the tortured market designated by the government, no more than 12% of the business, all reason to divest Holmes from Grinnell disappears. This divestiture decreed for Holmes—which company is only in the burglar and holdup protection business and purchases nothing from Grinnell—is just as extreme and just as uncalled for as was the prohibition against future employment of Mr. Fleming by the defendants.

Actually, as the government's brief also reveals, the government was just as non-plussed as the defendants, not

* For the other erroneous findings of fact, see Holmes' main brief, pp. 15-26.

only by the relief decreed, but also by the district court's views on liability. The government's brief, it is significant to note, does not say, as the district court did in this case, that monopolization can be decreed in the absence of a showing of power to exclude competitors or to fix prices. Nor does the government's brief say, as the district court did in this case, that once defendants are found to have a predominant position in a designated market, it is their burden to prove that their market position did not result from a violation of the antitrust laws. Nor does the government's brief say, as the district court did in this case, that the sole reason for such an unprecedented, unheralded and unwarranted shift in the burden of proof was to effect a supposed (but, as pointed out in Holmes' main brief [pp. 44-46], an unrealizable) saving "in time in needlessly proving, defendant's predatory tactics, if any, or defendant's pricing, or production, or selling, or leasing, or marketing, or financial policies while in this predominant role." (R 745-6).

The government, like defendants, apparently was not, to quote from the district court's opinion (R 745), like "most of the cognoscenti who have expected that a day would come when the Supreme Court would announce that where one or more persons acting jointly had acquired so clear a dominance in a market as to have the power to exclude competition therefrom there was a rebuttable presumption that such power had been criminally acquired and was a monopolizing punishable under §2." Nor, like defendants, is the government able to explain the contradiction between this statement by the district court (that "the power to exclude competition" is a necessary part of the test of "criminally monopolizing") with the explicit finding by the district court (Findings 45, 46; R 756)—and which is undeniably the fact—that these defendants did not have the power to exclude competition.

Nor can the government explain how it is that the defendants here, who have 87% or more of the assertedly relevant market, do not have either the power to exclude competitors from that market or to control prices in that

market. The answer, of course, as shown in Holmes' main brief and in the ADT brief, is that the market is wrongly defined—and common-sense confirms that.

Indeed, the government does not even attempt to explain how it is that the non-accredited business of the defendants (almost half of Holmes' business and over 60% of ADT's burglar alarm business [R 311]) is included in the so-called relevant market while the very same business of non-accredited competitors of Holmes or ADT is excluded. Nor does the government attempt to explain how it is that industrial process service, which cannot be accredited, is nonetheless included in the "accredited" relevant market.

Nor does it make sense for the government to combine such different businesses as burglary protection (which Holmes has offered its customers since its founding in 1858) with fire alarm and sprinkler supervisory services (which Holmes has not gone into since commencing operations over 100 years ago, long before ADT or AFA came into the picture and the first 92 years of which were totally independent of Grinnell) while, at the same time, excluding from the market proprietary central station burglary protection (which, by the government's own definition on p. 61 of its brief, is the same as central station burglary protection operated by protective companies), burglary protection by direct connection to a police station or through a 24 hour telephone answering service, various types of local alarm burglary protection systems and watchmen protection. The government's brief says that central station protection is more reliable in that it allegedly alone "automatically discloses any defect in the hazard-detecting equipment" and "guarantees that there are always trained personnel" to respond, while, the government asserts, a watchman may be asleep or drunk or policemen may not come when called to a burglary or users of other types of protection services "may not properly maintain them" (see, e.g., pp. 7, 8, 34, 50, 59). This is technically incorrect and completely overlooks the fact that proprietary central station protection (which the government leaves out of the relevant market) is the same in technique and technology

as the central station protection offered by protection companies (which the government includes in the relevant market) (GX 348, R 3025; GX 320, R 2478; GX 330, R 2721; GX 331, R 2745-6; R 366-7, 520-1). It also overlooks the fact that just as many, if not more, hazards affect central station guards in getting to the scene of a burglary than policemen summoned through a direct connection or through a telephone answering service or by the action of a local alarm.

The truth of the matter, of course, is that all burglary protection services have hazards—some of which in fact, are identical from service to service (as in the case of proprietary central stations and protection company central stations or with respect to interruption of a telephone cable or short-circuits or power failures) and others, such as central station guards (whether protective company guards or proprietary central station guards) having an accident or becoming delayed enroute, are equivalent to one another. But, in any event, no protection service is infallible and, certainly, there is no valid basis for saying, as the government brief does, that policemen, summoned by a direct connection from the protected premises to the police station or through a telephone answering service, or proprietary central station guards, will not respond to a burglar alarm as well as protection company central station guards.* Indeed, that the government is reduced to urging this is demonstrative of how far-fetched the market it designated actually is. Even local alarm protection services, we should point out, may have built-in warnings that reveal when they are inoperable. And the fact that the Holmes sales manager, as noted on page 61 of the government brief, must state that Holmes' protection was superior to non-central station protection in itself, shows that, in the field, he was facing real competition from such other protection services.

* In point of fact, municipal authorities have requested direct connected protection service to avoid the added opportunity for human error present in central station protection service. (See, *e.g.*, Exh. D 4, R 496; D 97, R 4526-7; W 38a, R 5518.)

Actually, at two points, the government brief defines the product market in these words (pp. 33, 47): "the product involved essentially is hazard protection through the means of a central warning system". Under that definition, proprietary central station protection service, direct-connected protection service and telephone answering protection service (each of which the district court excluded from the designated product market) obviously should be included in the relevant market. (GX 348, R 3025; GX 320, R 2478; GX 330, R 2721; GX 331, R 2744-6, R 366-7, 5021; GX 319, R 2419-21; GX 328, R 2597.)

Nor does the government brief justify the ignoring by the district court of the conceded overlap in insurance discounts available for the various protection services. (See Holmes' main brief, p. 30.) Holmes' bank burglary subscribers, for instance, usually receive no insurance discounts and yet are included in the relevant market, while similar financial institutions using watchmen may receive substantial insurance discounts and are not included. Likewise, Holmes' mercantile central station customers who receive a lessor discount than some local alarm users in an identical business are included in the government's relevant market, while the local alarm users are not. As the government brief specifically acknowledges (p. 52) "approximately 60 per cent of the subscribers to accredited central station burglary service do not receive the discounts."

So, too, the government brief fails to show how Holmes could be engaged in a national market or in interstate commerce where it and its subsidiaries operated in only three cities and had not a single subscriber in a different state than the central station that served it.

Nor does the government brief point to evidence rendering Holmes guilty of a conspiracy to monopolize or restrain trade. In this respect, the government can only mention that acquisitions were made by the defendants and there was an allegedly illegal agreement between ADT and Holmes entered into in 1906. But, Holmes has had no substantial history of acquisitions and, indeed, has made no acquisition in well over 30 years. And, the 1906 agree-

ment was terminated in 1947, a decade and a half before this suit was brought and while Holmes was still wholly owned by the New York Telephone Company. In other words, the agreement was cancelled three years before Grinnell acquired Holmes from the Telephone Company and, more than that, there is no evidence whatever that Grinnell even knew of the cancelled 1906 agreement.

Apparently recognizing—as did the district court—that the long-since-cancelled 1906 agreement itself was not a basis for a finding of current wrongdoing, the government urges that the limitations of the agreement continued after its termination and that this was wrongful and must be punished. But this is not so.

The government brief (footnote 29, p. 64) incorrectly states that the 1906 agreement limited Holmes "to a few cities". This is contradicted not only by the agreement (R 1312-15), but also by the statements on page 13 of the government brief. Holmes, in fact, did business in only three metropolitan areas, but it did so, not as the result of the agreement, but because of its independent business judgment, formulated without ADT's or Grinnell's involvement. The agreement restricted Holmes from going into the fire alarm business or outside of a territory that included Maryland, Delaware, the District of Columbia, New Jersey, Connecticut, Pittsburgh, New York City, Philadelphia and surburban counties around the latter cities (R 1313). That Holmes did not consider itself bound by the 1906 agreement after its termination is demonstrated by its nearly completed acquisition, after the agreement terminated, of Newark District Telegraph Company, which was in the fire alarm business. And, that it was not the agreement that caused Holmes not to expand its territory is seen by the fact that Holmes, even during the period of the 1906-1947 agreement with ADT, did not go into Maryland, the District of Columbia, Delaware, New Jersey, Connecticut or much of the surburban New York and Philadelphia areas—not, obviously, because of the agreement which specifically permitted it to operate in those areas. And, further demonstration of the insubstantiality

of the government theory that Holmes violated the antitrust laws by not going into the fire alarm business after the 1947 termination of the agreement comes from the undeniable fact, that, from its founding in 1858 (by the sponsor of an electric burglar alarm), for the 48 years *preceding* the 1906 agreement, Holmes also did not go into the fire alarm business, which business involves different risks, different problems and different devices than the burglar alarm business.

In short, for the government to urge—as it does—that Holmes' not going into the fire alarm business after 1947 violates the antitrust laws does not reconcile with Holmes' not having gone into that business from 1858 to 1906, long before it heard of ADT or Grinnell. Beyond that, such contention is refuted by Holmes' effort to go into the fire alarm business by acquiring a company engaged in that business, which effort terminated on the advice of counsel in January, 1961, three months before the government brought this suit.*

And, apart from all that, there was here not the semblance of a fair trial. While the government seeks to explain that the district court's comments such as "my views are more extreme than those of the government" and "I just assure you it [questions and answers showing the reasonableness of activities alleged to be in restraint of trade] is a great ceremonial act, as far as I am concerned" and "This is an exercise in trying to persuade Congress or five Justices of the Supreme Court but it won't have the slightest effect on me"; "I do not believe it makes the slightest bit of difference what is being shown in this case by both sets of counsel * * * I am quite sure that in the long run the Supreme Court of the United States is going to take about as narrow a view of the market as the circumstances here permit" were, in context, not proof of bias or prejudice, the government brief nowhere points out how comments such as those, made throughout the

* The government statement (Brief, pp. 12, 97) that "each of these defendants" had an outstanding offer to purchase a non-defendant company at the time this suit was filed is unsupportable insofar as Holmes is concerned.

trial (see the Grinnell main brief), could not but have imparted an atmosphere of haste and hostility that unfairly and prejudicially affected defense counsel and their witnesses.

More than that, however, the government makes no effort to explain—as it cannot—how a district judge could render the impartial justice of which this Court should approve where his attitude was, as he himself put it during the trial (R 371): "an attitude of predicting how far out nine moveable men moving to the left will move" and when, as he himself indicated after the trial, he felt he need not even attempt to digest the evidence. As he wrote (R 744): "Few judges who have sat in such cases have attempted to digest the plethora of evidence, or indeed could do so and at the same time do justice to other litigation in their courts".

Beyond even that, however, the government brief nowhere explains how a district judge who, on the opening of the trial, tells defendants' counsel (R 366): "You yourself put on me the burden of forming an opinion *and I did form one*" (emphasis added) could thereafter be capable of giving the defendants the fair trial before an impartial trier of the facts that elementary due process demands.

In short, what the government brief does not tell us is telling demonstration that there has been a serious miscarriage of justice here requiring reversal of the decree and, because of the plainly erroneous market definition, dismissal of the complaint.

Nor is the additional relief now sought by the government justified. From what has already been said, no relief (or punishment) should be directed to Holmes.* What the

*The government, in seeking transfer of title to the protection devices on the subscribers' premises to the subscriber is particularly wrong and also inconsistent. On the one hand, the government asserts that protection services other than central station protection should be excluded from the relevant market because (p. 8) "the users of other types of service * * * may not properly maintain them" or (p. 55) "these other systems 'through neglect or through ignorance of the property owner * * * might deteriorate or not be functioning at the time it was probably needed'" and, on the other

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OCTOBER TERM, 1965

No. 74

GRINNELL CORPORATION,
Appellant,

v.

UNITED STATES OF AMERICA,
Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF RHODE ISLAND.

REPLY BRIEF FOR GRINNELL CORPORATION.

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March 24, 1966.

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1. *The Three-Pronged Decree.*

Government counsel have now conceded that Judge Wyzanski erred in two parts of his "three-pronged decree" (Gov't Br. pp. 38, 94). Their brief states of the injunction against continued employment of the witness Fleming: "We do not believe that this [record] is a sufficient basis to justify relief of such severity" (p. 95), and of the injunction to obey the Sherman Act: "In *Schine Chain Theatres v. United States,* 334 U. S. 110, 125-126, this Court condemned a similarly sweeping provision" (*ibid.*).

While defending the remaining prong (ordering divestiture by Grinnell of all its alarm company subsidiaries),* the government now concedes that distribution of alarm company stock to Grinnell's stockholders, as authorized below, would be an appropriate method of accomplishing any divestiture (Gov't Br. p. 87 fn.). But even at this late date, there is no adequate explanation as to why triple

* In doing so, the government denies that Grinnell acquired ADT after a Department of Justice "clearance". Plaintiff's answers to interrogatories indicate that the letter its brief suggests was a mere "thank you" letter (Gov't Br. p. 70 fn.) was sent when

divestiture would be necessary if there were a [illegible]orcement of ADT (which the government claims is itself a monopoly, Gov't Br. p. 89, although the trial court did not so find) from AFA and Holmes (which the government claims were precluded from competition with ADT, Gov't Br. p. 36). The government's silence takes on added significance in the light of its failure to controvert our arguments that Grinnell is not a substantial supplier or customer of any of the other defendants, and that its continued ownership of the stock of any alarm company would not afford that company any competitive advantage, and that Grinnell was merely an investor in the alarm companies (Grinnell Br. pp. 8-10, 64-66, 82-83).*

2. *The Fairness of the Trial.*

To the extent that the government's brief answers our arguments, it at least brings into sharper focus the points

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the Department decided to suspend inquiry concerning the proposed acquisition (Gr. Ex. J-76, R. 4309, 4311, 668). Grinnell's counsel at the time interpreted this as a "clearance" and so advised Grinnell (R. 681). While its good faith reliance on the Department's decision to go no further with its investigation may not constitute a defense, the government's position at the time of this acquisition is at least worthy of consideration in determining the scope of equitable relief (see Grinnell Br. p. 82). *Cf. United States* v. *United Shoe Machinery Corp.*, 110 F. Supp. 295, 333 (D. Mass. 1953), *aff'd per curiam*, 347 U. S. 521 (1954).

The government does acknowledge that it gave a "clearance" to ADT's later acquisition in Boston (Gov't Br. p. 71 fn.), which was the only acquisition consummated by ADT or any defendant in the allegedly-relevant market subsequent to Grinnell's investments in the alarm companies (Findings 49, 50, R. 757-58).

* The government concedes that Judge Wyzanski was in error in his finding distorting Mr. Fleming's testimony that he could only recall one instance in which an alarm company's management was overruled by its board of directors (Gov't Br. p. 82 fn.). Moreover, the government makes no effort to defend the trial court's ultimate conclusion that Grinnell participated in the operations of these companies. On the contrary, it apparently argues that Grinnell is responsible for what the alarm companies did, not because it actually participated in any of their actions, but because it had "the power to impose its will upon them" (Gov't Br. p. 81). Any such theory of vicarious liability runs afoul of the authorities we have already cited (Grinnell Br. p. 90).

at issue between the parties. Chief among these is the issue of whether or not the defendants had a fair trial, in the light of the trial judge's pretrial pronouncements on the merits, his conduct during the trial, and his punitive decree.*

Government counsel seek to explain some of Judge Wyzanski's statements during the trial on the ground that they "reflected merely misapprehensions about minor aspects of the case" (Gov't Br. p. 113); for example, when he admonished defense counsel:

> "The Court: * * * I have a strong objection to the misrepresentation. This Court set the matter for November, 1963 and has from time to time postponed it to meet the convenience of counsel" (R. 324).
>
> "The Court: * * * over my strong reluctance you insisted that I should hold a case in suspense so that you could confer about a possible settlement and that I could look at the papers with respect to the matter. You, not I, created the difficulty. Any Judge would properly resent being drawn into a situation as a trap and then have the door let loose" (R. 336).
>
> "The Court: You proceeded to disqualify two Judges and sought to disqualify the third on the eve of a trial that had been postponed for nine months" (*ibid.*).

Conceding that these statements were erroneous, the government maintains that they do not prove prejudice. We say that they are part of a mosaic which, viewed as a whole, compels the conclusion that in this case an able judge below was in fact prejudiced, and that the proceedings before him (regardless of who was at fault) lacked that judicial impartiality and detachment which are to be expected in our courts. *Offutt* v. *United States*, 348 U. S. 11, 14 (1954).

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* See *United States* v. *United Shoe Machinery Corp.*, *supra*, at pp. 347-48.

That mosaic stands in even bolder relief now that the government has agreed with us that such statements, impugning defendants' motives in making their disqualification motions, are incorrect. To begin with, the court was wrong when it stated it had set this case for trial prior to the peremptory 18-day notice given on May 28, 1964, and had postponed the trial at the request of defendants.* Again,

> "There is nothing in the record which supports the third statement that the pretrial submission of briefs as to relief was done over the judge's 'strong reluctance.' On the contrary, at the hearing on December 28, 1963 he had stated that he viewed the proposal as 'very helpful in this situation' (R. 128). *The court also erred in assuming that the defendants were responsible for the disqualification of the two other judges who previously had been assigned to hear the case.*" (Gov't Br. p. 113, emphasis added.)

Characterizing these as "minor factual errors" (Gov't Br. p. 113 fn.), government counsel attempt to explain or minimize them in various ways which require no detailed refutation here.

The record itself, which we quoted extensively in our main brief, amply answers these contentions. But the government's brief goes even further and seeks to justify Judge Wyzanski's pretrial statements to the effect that his views were even more extreme than those of the government. It suggests (a) that his opinion (which he formed not only prior to trial but prior to the receipt of any evidence) was "formed from the evidence in the case" (Gov't Br. p. 105), and (b) that his clear and colorful announcements before

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* "[T]here had been no indication prior to May 28 that the court was planning to set a trial date at that time" (Gov't Br. p. 107); in giving this "rather short" notice (*ibid.*) the court "may have acted somewhat strictly" (p. 108). Government counsel conclude, however, that the peremptory trial date, "while perhaps unexpected, was not unreasonable" (p. 114).

and during the trial* should be read as if they contained the unspoken premise that he was only expressing *tentative* views as to where he would come out "if the facts were as the government had alleged" (Gov't Br. pp. 39-40, 105).

It is true that Judge Wyzanski was relatively temperate in his comments at the abortive pretrial conference on relief of May 28, 1964, on which the government relies (see Grinnell Br. pp. 21-22). Defendants did not then claim he was disqualified; it was only after the conference of June 3, 1964, when the trial judge made the defendants realize that his convictions were unalterable, that they felt obliged to file affidavits of bias and prejudice.** From that time until after both sides had rested, Judge Wyzanski repeatedly told defendants (without any of the qualifying hypothetical premises government counsel now seek to read into the record): "You yourselves put on me the burden of forming an opinion and I did form one" (R. 336, see also R. 346) and that "I know very well where I come out" (R. 376). It was only "[a]fter the presentation of the evidence had been completed" (Gov't Br. p. 108)—and, of course, well after the defendants' disqualification petitions were filed—that Judge Wyzanski professed having an open mind. *Cf. Berger* v. *United States,* 255 U. S. 22, 36 (1921). These belated declarations are in marked contrast with his spontaneous statements before and during the trial.

Government counsel seem to be saying that even if Judge Wyzanski was prejudiced he was not disqualified

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E.g.: "I know where I come out not because I have, as has been suggested, a bias except that kind of bias which emanates from prior experience in this field, the kind of bias which constitutes judgment" (R. 376).

**He stated on June 3rd:

"* * * my views are more extreme than those of the government; and I have also made you realize that if I am required to make Findings and reach Conclusions I am opening up third-party suits that will make, in view of the size of the industry, the percentage of people involved higher than in the electrical cases. Is that clear?" (R. 281-82)

from conducting the trial because his prejudice was not personal (Gov't Br. p. 105).* The short answer to this is that it is difficult to conceive any bias or prejudice more disqualifying than an absolute prejudgment of the issues of both liability and relief—to the extent that the judge's views are admittedly more extreme than those of the plaintiff. A judge commencing a trial in that frame of mind is clearly personally prejudiced and incapable of according a fair trial (or, *a fortiori,* satisfying the appearance of justice). Defendants' request for the assignment of another judge not suffering from such personal bias and prejudice should therefore have been granted.

The government insists that Judge Wyzanski's preconceptions of this case were proper because they were based on its brief on relief (Gov't Br. p. 105). While that brief is not evidence in any event, nothing in it remotely resembles the lower court's unsupported findings concerning Mr. Fleming's or Grinnell's alleged domination of the alarm companies' operations (Grinnell Br. pp. 66-71). It is quite possible, however, that the government's "relief brief" was the source of the trial court's fundamental fallacies that Grinnell manufactures central station equipment (Findings 17, 20; R. 750, 751) and was precluded by the 1907 agreements from entering the central station busi-

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* The extent to which Judge Wyzanski was personally involved in this case is shown by the record. In an apparent reference to the newspaper publicity that attended the disqualification motions, Judge Wyzanski upbraided counsel:

> "The Court: You have made it quite plain to the country at large, or at least to this community, that you regarded me as having formed an opinion from some other way than a Judge ought to form an opinion." (R. 336)

Later that same day, he again remonstrated:

> "The Court: Mr. Fritz, all that you have done is to say that a Judge who has evidence that came into the Court necessarily was required to form an opinion, did form it to the extent necessary to make rulings, and on that basis you chose to file an affidavit of disqualification, the character of which may be the character of you but not of me." (R. 346)

ness (Finding 53, R. 760) for each of these misstatements is made in that brief (Plaintiff's Position as to the Basis of Liability of Each of the Defendants, pp. 37, 15, Box 8 of record on appeal as transmitted).* It is on this kind of "evidence" that the government rests its contention that it was proper for the trial court to prejudge this case.

Moreover, defendants were obviously entitled to a fair trial even if their affidavits of bias and prejudice were (as the government contends) technically insufficient. Our main brief demonstrates in detail that Judge Wyzanski conducted the trial in a manner so unfair as to require reversal independently of the disqualification statute. Among other things, it shows that prejudicial error resulted from the trial court's admission of all proffered evidence indiscriminately against all defendants, refusing to consider any objections, and from its failure to examine the evidence against each defendant separately and to distinguish among the defendants in its findings. In a last-ditch effort to correct these egregious errors, the government assures us that: "In preparing its brief the government has taken great care to rely only upon evidence that is clearly admissible" (Gov't Br. p. 117).

Perhaps anticipating that even this generous assurance may not assuage all doubt as to the absolute objectivity of the government's analysis of this voluminous record, its brief continues: "This Court, upon reviewing the record, will of course reject any evidence that it concludes was improperly admitted" (*ibid.*).**

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* Indeed, the government's present brief frequently makes the misstatement that the expired fire alarm agreements prohibited Grinnell from engaging in the central station business (Gov't Br. pp. 15, 35-36, 68) without citing any record references.

** A footnote to this statement reveals the government's doubts as to whether the district court was correct in its basic evidentiary ruling whereby it accepted all of the government's evidence *en masse* "on the conspiracy theory".

SUPREME COURT OF THE UNITED STATES

Nos. 73, 74, 75, 76 AND 77.—OCTOBER TERM, 1965.

73	United States, Appellant, *v.* Grinnell Corporation et al.	On Appeals From the United States District Court for the District of Rhode Island.
74	Grinnell Corporation, Appellant, *v.* United States.	
75	American District Telegraph Co., Appellant, *v.* United States.	
76	Holmes Electric Protective Co., Appellant, *v.* United States.	
77	Automatic Fire Alarm Co., Appellant, *v.* United States.	

[June 13, 1966.]

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

This case presents an important question under § 2 of the Sherman Act,[1] which makes it an offense for any person to "monopolize . . . any part of the trade or commerce among the several States." This is a civil suit brought by the United States against Grinnell Corporation (Grinnell), American District Telegraph Co.

[1] 26 Stat. 209, as amended, 15 U. S. C. § 2 (1964 ed.).

(ADT), Holmes Electric Protective Co. (Holmes) and Automatic Fire Alarm Co. of Delaware (AFA). The District Court held for the Government and entered a decree. All parties appeal,[2] the United States because it deems the relief inadequate and the defendants both on the merits and on the relief and on the ground that the District Court denied them a fair trial. We noted probable jurisdiction. 381 U. S. 910.

Grinnell manufactures plumbing supplies and fire sprinkler systems. It also owns 76% of the stock of ADT, 89% of the stock of AFA, and 100% of the stock of Holmes.[3] ADT provides both burglary and fire protection services; Holmes provides burglary services alone; AFA supplies only fire protection service. Each offers a central station service under which hazard-detecting devices installed on the protected premises automatically transmit an electric signal to a central station.[4] The central station is manned 24 hours a day. Upon receipt of a signal, the central station, where appropriate, dispatches guards to the protected premises and notifies

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[2] Expediting Act § 2, 32 Stat. 823, as amended, 15 U. S. C. § 29 (1964 ed.); *United States* v. *Loew's, Inc.*, 371 U. S. 38.

[3] These are the record figures. Since the time of the trial, Grinnell's holdings have increased. Counsel for Grinnell has advised this Court that Grinnell now holds 80% of ADT's stock and 90% of the stock of AFA.

[4] Among the various central station services offered are the following:

(1) *automatic burgler alarms.*

(2) *automatic fire alarms.*

(3) *sprinkler supervisory service:* any malfunctions in the fire sprinkler system (*e. g.*, changes in water pressure, dangerously low water temperatures, etc.) are reported to the central station.

(4) *watch signal service:* night watchmen, by operating a key-triggered device on the protected premises, indicate to the central station that they are making their rounds and that all is well; the failure of a watchman to make his electrical report alerts the central station that something may be amiss.

the police or fire department direct. There are other forms of protective services. But the record shows that subscribers to accredited central station service (*i. e.*, that approved by the insurance underwriters) receive reductions in their insurance premiums that are substantially greater than the reduction received by the users of other kinds of protection service. In 1961 accredited companies in the central station service business grossed $65,000,000. ADT, Holmes, and AFA are the three largest companies in the business in terms of revenue: ADT (with 121 central stations in 115 cities) has 73% of the business; Holmes (with 12 central stations in three large cities) has 12.5%; AFA (with three central stations in three large cities) has 2%. Thus the three companies that Grinnell controls have over 87% of the business.

Over the years ADT purchased the stock or assets of 27 companies engaged in the business of providing burglar or fire alarm services. Holmes acquired the stock or assets of three burglar alarm companies in New York City using a central station. Of these 30, the officials of seven agreed either not to engage in the protective service business in the area for periods ranging from five years to permanently. After Grinnell acquired control of the other defendants, the latter continued in their attempts to acquire central station companies—offers being made to at least eight companies between the years 1955 and 1961, including four of the five largest nondefendant companies in the business. When the present suit was filed, each of those defendants had outstanding an offer to purchase one of the four largest nondefendant companies.

In 1906, prior to the affiliation of ADT and Holmes, they made a written agreement whereby ADT transferred to Holmes its burglar alarm business in a major part of the Middle Atlantic States and agreed to refrain forever from engaging in that business in that area, while

Holmes transferred to ADT its watch signal business and agreed to limit its activities to burglar alarm service and night watch service for financial institutions. While this agreement was modified several times and terminated in 1947, in 1961 Holmes still restricted its business to burglar alarm service and operated only in those areas which had been allocated to it under the 1906 agreement. Similarly, ADT continued to refrain from supplying burglar alarm service in those areas earlier allocated to Holmes.

In 1907 Grinnell entered into a series of agreements with the other defendant companies and with Automatic Fire Protection Co. to the following effect:

AFA received the exclusive right to provide central station sprinkler supervisory and waterflow alarm and automatic fire alarm service in New York City, Boston and Philadelphia, and agreed not to provide burglar alarm service in those cities or central station service elsewhere in the United States.

Automatic Fire Protection Co obtained the exclusive right to provide central station sprinkler supervisory and waterflow alarm service everywhere else in the United States except for the three cities in which AFA received that exclusive right, and agreed not to engage in burglar alarm service.

ADT received the exclusive right to render burglar alarm and nightwatch service throughout the United States. (Under ADT's 1906 agreement with Holmes, however, it could not provide burglar alarm services in the areas for which it had given Holmes the exclusive right to do so.) It agreed not to furnish sprinkler supervisory and waterflow alarm service anywhere in the country and not to furnish automatic fire alarm service in New York City, Boston or Philadelphia (the three cities allocated to AFA). ADT agreed to connect to its

central stations the systems installed by AFA and Automatic.

Grinnell agreed to furnish and install all sprinkler supervisory and waterflow alarm actuating devices used in systems that AFA and Automatic would install, and otherwise not to engage in the central station protection business.

AFA and Automatic received 25% of the revenue produced by the sprinkler supervisory waterflow alarm service which they provided in their respective territories; ADT and Grinnell received 50% and 25%, respectively, of the revenue which resulted from such service. The agreements were to continue until February 1954.

The agreements remained substantially unchanged until 1949 when ADT purchased all of Automatic Fire Protection Co.'s rights under it for $13,500,000. After these 1907 agreements expired in 1954, AFA continued to honor the prior division of territories; and ADT and AFA entered into a new contract providing for the continued sharing of revenues on substantially the same basis as before.[5] In 1954 Grinnell and ADT renewed an agreement with a Rhode Island company which received the exclusive right to render central station service within Rhode Island at prices no lower than those of ADT and which agreed to use certain equipment supplied

[5] In 1959, ADT complained that AFA's share of the revenues was excessive. AFA replied, in a letter to the president of Grinnell (which by that time controlled both ADT and AFA), that its share was just compensation for its continued observance of the service and territorial restrictions: "[*T*]*he geographic restrictions placed upon us plus the requirement that we confine our activities to sprinkler and fire alarm services exclusively,* since 1907 and presumably into the future, has definitely retarded our expansion in the past to the benefit of ADT growth. . . . [AFA's] contribution must also include the many things that helped make ADT big." (Emphasis added.)

by Grinnell and ADT and to share its revenues with those companies. ADT had an informal agreement with a competing central station company in Washington, D. C., "that we should not solicit each other's accounts."

ADT over the years reduced its minimum basic rates to meet competition and renewed contracts at substantially increased rates in cities where it had a monopoly of accredited central station service. ADT threatened retaliation against firms that contemplated inaugurating central station service. And the record indicates that, in contemplating opening a new central station, ADT officials frequently stressed that such action would deter their competitors from opening a new station in that area.

The District Court found that the defendant companies had committed *per se* violations of § 1 of the Sherman Act as well as § 2 and entered a decree. 236 F. Supp. 244.

I.

The offense of monopoly under § 2 of the Sherman Act has two elements: (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident. We shall see that this second ingredient presents no major problem here, as what was done in building the empire was done plainly and explicitly for a single purpose. In *United States* v. *du Pont & Co.*, 351 U. S. 377, 391, we defined monopoly power as "the power to control prices or exclude competition." The existence of such power ordinarily may be inferred from the predominant share of the market. In *American Tobacco Co.* v. *United States*, 328 U. S. 781, 797, we said that "over two-thirds of the entire domestic field of cigarettes and . . . over 80 per cent of the field of comparable cigarettes" constituted "a substantial monopoly." In *United States* v.

Aluminum Co. of America, 148 F. 2d 416, 429, 90% of the market constituted monopoly power. In the present case, 87% of the accredited central station service business leaves no doubt that the congeries of these defendants have monopoly power—power which, as our discussion of the record indicates, they did not hesitate to wield—if that business is the relevant market. The only remaining question therefore is, what is the relevant market?

In case of a product it may be of such a character that substitute products must also be considered, as customers may turn to them if there is a slight increase in the price of the main product. That is the teaching of the *du Pont* case (*supra*, at 395, 404) *viz.*, that commodities reasonably interchangeable make up that "part" of trade or commerce which § 2 protects against monopoly power.

The District Court treated the entire accredited central station service business as a single market and we think it was justified in so doing. Defendants argue that the different central station services offered are so diverse that they cannot under *du Pont* be lumped together to make up the relevant market. For example, burglar alarm services are not interchangeable with fire alarm services. They further urge that *du Pont* requires that protective services other than those of the central station variety be included in the market definition.

But there is here a single use, *i. e.*, the protection of property, through a central station that receives signals. It is that service, accredited, that is unique and that competes with all the other forms of property protection. We see no barrier to combining in a single market a number of different products or services where that combination reflects commercial realities. To repeat, there is here a single basic service—the protection of property through use of a central service station—that must be compared with all other forms of property protection.

In § 2 cases under the Sherman Act, as in § 7 cases under the Clayton Act (*Brown Shoe Co.* v. *United States*, 370 U. S. 294, 325) there may be submarkets that are separate economic entities. We do not pursue that question here. First, we deal with services, not with products; and second, we conclude that the accredited central station is a type of service that makes up a relevant market and that domination or control of it makes out a monopoly of a "part" of trade or commerce within the meaning of § 2 of the Sherman Act. The defendants have not made out a case for fragmentizing the types of services into lesser units.

Burglar alarm service is in a sense different from fire alarm service; from waterflow alarms; and so on. But it would be unrealistic on this record to break down the market into the various kinds of central station protective services that are available. Central station companies recognize that to compete effectively, they must offer all or nearly all types of service.[6] The different forms of accredited central station service are provided from a single office and customers utilize different services in combination. We held in *United States* v. *Philadelphia Nat'l Bank*, 374 U. S. 321, 356, that "the cluster" of services denoted by the term "commercial banking" is "a distinct line of commerce." And see *United States* v.

[6] Thus, of the 38 nondefendant firms operating a central service station protective service in the United States in 1961, 24 offered all of the following services: automatic fire alarm; waterflow alarm and sprinkler supervision; watchman's reporting and manual fire alarm; and burglar alarm. Of the other firms, 11 provided no watchman's reporting and manual fire alarm service; six provided no automatic fire alarm service; and two offered no sprinkler supervisory and waterflow alarm service. Moreover, of the 14 firms not providing the full panoply of services, 10 lacked only *one* of the above-described services. Appellant ADT's assertion that "very few accredited central stations furnish the full variety of services" is flatly contradicted by the record.

First National Bank & Trust Co., 376 U. S. 665, 667–668. There is, in our view, a comparable cluster of services here. Those bank cases arose under § 7 of the Clayton Act where the question was whether the effect of a merger "in any line of commerce" may be "substantially to lessen competition." We see no reason to differentiate between "line" of commerce in the context of the Clayton Act and "part" of commerce for purposes of the Sherman Act. In the two § 7 national bank cases just mentioned, *services*, not *products* in the mercantile sense, were involved. In our view the lumping of various kinds of *services* makes for the appropriate market here as it did in those § 7 cases.

There are, to be sure, substitutes for the accredited central station service. But none of them appears to operate on the same level as the central station service so as to meet the interchangeability test of the *du Pont* case. Non-automatic and automatic local alarm systems appear on this record to have marked differences, not the low degree of differentiation required of substitute services as well as substitute articles.

Watchman service is far more costly and less reliable. Systems that set off an audible alarm at the site of a fire or burglary are cheaper but often less reliable. They may be inoperable without anyone knowing it. Moreover, there is a risk that the local ringing of an alarm will not attract the needed attention and help. Proprietary systems that a customer purchases and operates are available; but they can be used only by a very large business or by government and are not realistic alternatives for most concerns. There are also protective services connected directly to a municipal police or fire department. But most cities with an accredited central station do not permit direct, connected service for private businesses. These alternate services and devices differ, we are told, in utility, efficiency, reliability, responsiveness,

siderable vehemence here.[9] Again we cannot resolve them on this record The various aspects of this controversy must be explored by the District Court and suitable protective provisions included in the decree that deprive these two devices of the coercive power that they apparently have had towards restraining competition and creating a monopoly.

The Government proposed that the defendants be required to sell, on nondiscriminatory terms, any devices manufactured by them for use in furnishing central station service. It seems clear that if the competitors are to be able to compete effectively for the existing customers of the defendants when the present service contracts expire, they must be assured of replacement parts to maintain those systems.[10]

The Government urges visitation rights, that is, requiring reports, examining documents, and interviewing company personnel, a relief commonly granted for the purpose of determining whether a defendant has complied with an antitrust decree. See *United States* v.

[9] Specifically, the areas of disagreement are: (1) Defendants urge that barring them from offering five-year contracts would put them at a competitive disadvantage *vis-à-vis* nondefendant firms; the Government responds that since they violated the law, they may properly be subjected to restrictions not borne by others. See *United States* v. *Bausch & Lomb Co.*, 321 U. S. 707, 723–724. (2) Some customers of defendants may wish to have long-term contracts; the Government responds that this may be explored on remand. (3) There is some dispute as to whether, if the central station company cannot retain title to the equipment it installs, the insurance companies will accredit the system. This, too, is a proper subject for inquiry on remand.

[10] Prior to trial, the defendants agreed that this would be an appropriate provision in a decree were the Government to prevail in all its claims of antitrust violations. Although defendants now maintain that this pretrial discussion was "settlement talk," that earlier concession is a relevant factor that the District Judge can properly take into account on remand.

United States Gypsum Co., 340 U. S. 76, 95. The District Court gave no explanation for its refusal to grant this relief.[11] It is so important and customary a provision that the District Court should reconsider it.

Defendants urge and the Government concedes that the barring of Mr. Fleming from the employment of any of the defendants is unduly harsh and quite unnecessary on this record. While relief of that kind may be appropriate where the predatory conduct is conspicuous, we cannot see that any such case was made out on this record.

The Government objects, as do the defendants, to the broad and generalized terms of the restraining order. They properly point out, as we emphasized in *Schine Theatres* v. *United States*, *supra*, at 125–126, that the precise practices found to have violated the action be specifically enjoined. On remand we suggest that that course be taken.

The defendants object to the requirements that Grinnell divest itself of its holdings in the three alarm company defendants, but we think that provision is wholly justified. Dissolution of the combination is essential as indicated by many of our cases starting with *Standard Oil Co.* v. *United States*, 221 U. S. 1, 78. The defendants object to that portion of the decree that bars them from acquiring interests in firms in the accredited central station business. But since acquisition was one of the methods by which the defendants acquired their market power and was the method by which Grinnell put the combination together, an injunction against the repetition of the practice seems fully warranted. The defendants further object to the requirement in the decree that the alarm company defendants report to the Department of Justice any deviation they make from their

[11] This provision, too, gained pretrial acceptance. See n. 10, *supra*.

list prices. We make no comment on that because in view of the other extensive changes necessary in the decree, the District Court might well deem it to be unnecessary in the fashioning of the new decree. In other words, we leave that matter open, to rest finally in the discretion of the District Court.

III.

The defendants contend that Judge Wyzanski, who tried the case, was personally biased and prejudiced and should have been disqualified from sitting in the case, and that he denied them a fair trial. We think this point is without merit.

The complaint was filed in April 1961, the answers in July 1961. Shortly thereafter extensive taking of depositions began. The District Court in January 1963 directed that no depositions be taken after September 1, 1963. In response to an inquiry from the court both sides suggested that the trial be set no earlier than January 1964.

At a pretrial conference in December 1963, government counsel told the court that the parties had been trying to reach agreement on a consent decree but were far apart and asked how the court would like to handle the presentation of the evidence in the event a settlement was not reached. Grinnell's lawyer suggested that the next appropriate procedure would be a pretrial on the question of relief—a suggestion that the District Court construed as an invitation to the court to discuss the relief apart from the merits. The Government objected. The court then asked for a brief from each side setting forth its views on relief if the Government prevailed on the merits. In response to the court's statement that "as I understand it, you want to find out what kind of relief I would be likely to allow if the government's case stood virtually uncontradicted," Grinnell's counsel replied: "That is what I had in mind, your Honor, yes."

Thereupon the court set a day for such a hearing. At the next pretrial conference Grinnell's counsel stated that "if your Honor would indicate the relief that might be appropriate in this case that would help both sides to come to a better understanding."

Then the following colloquy occurred:

> "THE COURT. 'I don't think it would help very much.'
>
> "Mr. MCINERNEY. 'Well, your Honor, I think it would help both the plaintiff and the defendants to know what is really at stake here in this trial.'
>
> "THE COURT. 'I assure you that you would not be helped by anything I would say. You would do better to get together with the government rather than run the risk of what I would say from what I have seen. Let me just assure you of that. . . .'"

The case was then set for trial on June 15, 1964. When Grinnell's counsel sought to argue further, the court stated: "There is no use in discussing it with me. I have read enough to know that if I have to decide this case on what I have seen from the government you will not be in a position at this stage to agree to it."

On June 3, 1964, defendants argued for a postponement of the trial, saying they needed more time. The court denied the motion. Then they argued that the relief issues to be tried be limited to those raised by the pleadings so as to eliminate what they considered to be extraneous issues raised by the Government. To that the court replied:

> "I can't understand frankly why you don't realize that you have forced me to look at the documents in this case, which I dislike doing in advance of trial. You have invited me, therefore, into what I regard as, from your point of view, a rather undesirable situation. I think I made that clear at the

beginning. I have told you that, forced by you to look, my views are more extreme than those of the government; and I have also made you realize that if I am required to make Findings and reach Conclusions I am opening up third-party suits that will make, in view of the size of the industry, the percentage of people involved higher than in the electrical cases."

Shortly thereafter defendants filed a motion [12] for the disqualification of Judge Wyzanski on the grounds of personal bias and prejudice.[13]

The alleged bias and prejudice to be disqualifying must stem from an extra-judicial source and result in an opinion on the merits on some basis other than what the judge learned from his participation in the case. *Berger* v. *United States*, 255 U. S. 22, 31. Any adverse attitudes that Judge Wyzanski evinced toward the defendants were based on his study of the depositions and briefs which the parties had requested him to make. What he said reflected no more than his view that, if the facts were as the Government alleged, stringent relief was called for.

During the trial he repeatedly stated that he had not made up his mind on the merits. During the trial he ruled certain evidence to be irrelevant to the issues and when the lawyer persisted in offering it Judge Wyzanski

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[12] 28 U. S. C. § 144 (1964 ed.) provides in relevant part:

"Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding."

[13] Judge Wyzanski referred the question of his disqualification to Chief Judge Woodbury of the Court of Appeals for the First Circuit who after hearing oral argument held that no case of bias and prejudice had been made out under § 144.

said, "Maybe you will persuade somebody else. And if you think so, all right. I just assure you it is a great ceremonial act, as far as I am concerned." We do not read this statement as manifesting a closed mind on the merits of the case but consider it merely a terse way of repeating the previously stated ruling that this particular evidence was irrelevant.

We have examined all the other claims of the defendants made against Judge Wyzanski and find that the claim of bias and prejudice is not made out. Our discussion of the relief which he granted shows indeed that he was, in several critical respects, too lenient with those who now charge him with bias and prejudice.

The judgment below is affirmed except as to the decree. We reverse and remand for further hearing on the nature of the relief consistent with the views expressed herein.

It is so ordered.

SUPREME COURT OF THE UNITED STATES

Nos. 73, 74, 75, 76 and 77.—October Term, 1965.

United States, Appellant, 73 *v.* Grinnell Corporation et al. Grinnell Corporation, Appellant, 74 *v.* United States. American District Telegraph Co., Appellant, 75 *v.* United States. Holmes Electric Protective Co., Appellant, 76 *v.* United States. Automatic Fire Alarm Co., Appellant, 77 *v.* United States.	On Appeals From the United States District Court for the District of Rhode Island.

[June 13, 1966.]

Mr. Justice Harlan, dissenting.

I cannot agree with the Court that the relevant market has been adequately proved. I do not dispute that a national market may be found even though immediate competition takes place only within a single city or town, some of which are themselves natural monopolies. For a national monopoly of such local enterprises may still have serious long-term impact on competition and be vulnerable on its own plane to the antitrust laws. In

the product market also the Court seems to me to make out a good enough case for lumping together the different kinds of central station protective service (CSPS). But I cannot agree that the facts so far developed warrant restricting the product market to accredited CSPS.

Because the ultimate issue is the effective power to control price and competition, this Court has always recognized that the market must include products or services "reasonably interchangeable" with those of the alleged monopolist. *United States* v. *du Pont & Co.*, 351 U. S. 377, 395. In this instance, there is no doubt that the accredited CSPS business does compete in some measure with many other forms of hazard protection: watchmen, local alarms, proprietary systems, telephone connected services, unaccredited CSPS, direct-connected (to police and fire stations) systems, and so forth. The critical question, then, is the extent of competition from these rivals.

The Government and the majority have stressed that differences in cost, reliability and insurance discounts may disqualify a competing form of protection for a particular customer. For example, it is said that proprietary systems are too expensive for any but large companies and local alarms may go unanswered in some neighborhoods. But if in general a CSPS customer has *a* feasible alternative to CSPS, it does not much matter that other ones are foreclosed to him, nor that other CSPS customers have different second choices. From this record, it may well be that other forms of protection are each competitive enough with segments of the CSPS market so that in sum CSPS rarely has a monopoly position.

From the defense standpoint, there is substantial evidence showing that the defendants do feel themselves under pressure from other forms of protection, that they do compete for customers, and that they do lower prices

even in areas where no CSPS competition is present. This concrete evidence of market behavior seems to me to rank higher than the kind of inference proof heavily relied on by the Government—physical differences between competing forms of protection, self-advertising claims of CSPS companies that they represent a superior service, and varying insurance discounts. Given that the burden of proof rests upon the Government, the record leaves me with such misgivings as to the validity of the District Court's findings on this score that I am not prepared to agree that the Government has made the showing of market domination that the law demands before a business is sundered.

At the same time the case must be recognized as a close one, and I am not ready to say at this stage that the findings and conclusions of the District Court might not be supportable. All things considered, I join with my Brothers FORTAS and STEWART to the extent of voting to remand the case for further proceedings so that new findings can be made as to the relevant *product* market. This course seems to me the more appropriate in light of the fact that because of the Expediting Act, 15 U. S. C. § 29 (1964 ed.), we have not had the benefit of any intermediate appellate sifting of this record. In view of the disposition I propose, I do not consider any of the other questions in the case.

competitive area to be considered is national. This Court now affirms that conclusion.

This is a non-sequitur. It is not permissible to seize upon the nationwide scope of defendants' operation and to bootstrap a geographical definition of the market from this. The purpose of the search for the relevant geographical market is to find the area or areas to which a potential buyer may rationally look for the goods or services that he seeks. The test, as this Court said in *United States* v. *Philadelphia Nat. Bank*, is "the geographic structure of supplier-customer relations," 374 U. S. 321, 357, quoting Kaysen and Turner, Antitrust Policy 102 (1959). And as MR. JUSTICE CLARK put it in *Tampa Electric Co.* v. *Nashville Coal Co.*, 365 U. S. 320, 327, the definition of the relevant market requires "careful selection of the market area in which the seller operates, and to which the purchaser can practicably turn for supplies." [5] The central issue is where does a potential buyer look for potential suppliers of the service—what is the geographical area in which the buyer has, or, in the absence of monopoly, would have, a real choice as to price and alternative facilities? This depends upon the facts of the market place, taking into account such economic factors as the distance over which supplies and services may be feasibly furnished, consistently with cost and functional efficiency.

The incidental aspects of defendants' business which the court uses cannot control the outcome of this inquiry. They do not measure the market area in which buyer and sellers meet. They have little impact upon the ascertainment of the geographical areas in which the economic and legal questions must be answered: have defendants "monopolized" or "restrained" trade; have they eliminated or can they eliminate competitors or

[5] See also *Brown Shoe Co.* v. *United States*, 370 U. S. 294, 336–337.

prevent or obstruct new entries into the business; have they controlled or can they control price for the services? These are the issues; and, in defendants' business, a finding that the "relevant market" is national is nothing less than a studied failure to assess the effect of defendants' position and practices in the light of the competition which exists, or could exist, in economically defined areas—in the real world.

Here, there can be no doubt that the correct geographic market is local. The services at issue are intensely local: they can be furnished only locally. The business as it is done is local—not nationwide. If, as might well be the case on this record, defendants were found to have violated the Sherman Act in a number of these local areas, a proper decree, directed to those markets, as well as to general corporate features relevant to the condemned practices, could be fashioned. On the other hand, a gross definition of the market as nationwide leads to a gross, nationwide decree which does not address itself to the realities of the market place. That is what happened here: The District Court's finding that the market was *nationwide* logically led it to a decree which operated on the only *national* aspect of the situation, the parent company nexus, instead of on the economically realistic areas—the local situations. This Court now directs the trial court to require "some [unspecified] divestiture" locally by the alarm companies. This is a recognition of the economic reality that the relevant competitive areas are local. In plain terms, the Court's direction to the trial court means a "market-by-market" analysis for the purpose of breaking up defendants' monopoly position and creating competitors and competition wherever feasible in particular cities. In my view, however, by so directing, the Court implies that which it does not command: that the case should be reconsidered at the trial court

level because of the improper standard it used to define the relevant geographic markets.

The trial court's definition of the "product" market even more dramatically demonstrates that its action has been Procrustean—that it has tailored the market to the dimensions of the defendants. It recognizes that a person seeking protective services has many alternative sources. It lists "watchmen, watchdogs, automatic proprietary systems confined to one site (often, but not always), alarm systems connected with some local police or fire station, often unaccredited CSPS [central station protective services], and often accredited CSPS." The court finds that even in the same city a single customer seeking protection for several premises may "exercise its option" differently for different locations. It may choose accredited CSPS for one of its locations and a different type of service for another.

But the court isolates from all of these alternatives only those services in which defendants engage. It eliminates all of the alternative sources despite its conscientious enumeration of them. Its definition of the "relevant market" is not merely confined to "central station" protective services, but to those central station protective services which are "accredited" by insurance companies.

There is no pretense that these furnish peculiar services for which there is no alternative in the market place, on either a price or a functional basis. The court relies solely upon its finding that the services offered by accredited central stations are of better quality, and upon its conclusion that the insurance companies tend to give "noticeably larger" discounts to policyholders who are accredited central station protective services. This Court now approves this strange red-haired, bearded, one-eyed man-with-a-limp classification.

The unreality of the trial court's market definition may best be illustrated by an example. Consider the situa-

tion of a retail merchant in Pittsburgh who wishes to protect his store against burglary. The Holmes Electric Protective Company, a subsidiary of Grinnell, operates an accredited central station service in Pittsburgh. It provides only burglary protection.

The gerrymandered market definition approved today totally excludes from the market consideration of the availability in Pittsburgh of cheaper but somewhat less reliable local alarm systems, or of more expensive (although the expense is reduced by greater insurance discounts) watchman service, or even of unaccredited central station service which virtually duplicates the Holmes service.

Instead, and in the name of "commercial realities," we are instructed that the "relevant market"—which totally excludes these locally available alternatives—requires us to look only to accredited central station service, and that we are to include in the "market" central stations which do not furnish burglary protection and even those which serve such places as Boston and Honolulu.[6]

Moreover, we are told that the "relevant market" must assume this strange and curious configuration despite evidence in the record and a finding of the trial court that "fringe competition" from such locally available alternatives as watchmen, local alarm systems, proprietary systems, and unaccredited central stations has, in at least 20 cities, forced the defendants to operate at a "loss" even though defendants have a total monopoly in these cities of the "market"—namely, the "accredited central station protective services." And we are led to this odd result even though there is in the record abundant evidence that customers switch from one form of

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[6] None of the stations operated by defendant Automatic Fire Alarm Company offers burglary protection, just as none of Holmes stations protects against the risk of fire.

property protection to another, and not always in the direction of accredited central station service.

I believe this approach has no justification in economics, reason or law. It might be supportable if it were found that the accredited central stations offer services which are unique in the sense that potential buyers—or at least a substantial, identifiable part of the trade—look only to them for the services in question, and that neither cost, type nor quality of service nor other factors brings competing services into the market. The findings here and the record do not permit this conclusion.

The Government's market definition, accepted by the trial court, is a distortion which inevitably leads to a superficial and distorted result even in the hands of a highly skilled judge. As this Court held in *Brown Shoe, supra,* the "reasonable interchangeability of use or the cross-elasticity of demand," determines the boundaries of a product market. 370 U. S., at 325. See also the *Cellophane Case,* 351 U. S., at 380. In plain language, this means that the court should have defined the relevant market here to include all services which, in light of geographic availability, price and use characteristics, are in realistic rivalry for all or some part of the business of furnishing protective services to premises. In the present situation, however, the court's own findings show that practical alternatives are available to potential users—although they vary from market to market and possibly from user to user. These have been arbitrarily excluded from the court's definition.

I do not suggest that wide disparities in quality, price and customer appeal could never affect the definition of the market. But this follows only where the disparities are so great that they create separate and distinct categories of buyers and sellers. The record here and the findings do not approach this standard. They fall far short of justifying the narrowing of the market as prac-

ticed here. I need refer only to the exclusion of non-accredited central stations, which the court seeks to justify by reference to differentials in insurance discounts. This differential may indeed affect the relative cost to the consumer of the competing modes of protection. But, in the absence of proof that it results in eliminating the competing services from the category of those to which the purchaser "can practicably turn" for supplies,[7] it does not justify their total exclusion. This sort of exclusion of the supposedly not-quite-so-attractive service from the basic definition of the kinds of business and service against which defendants' activity will be measured, is entirely unjustified on this record.[8]

The importance of this kind of truncated market definition vividly appears if we are to say, as the trial court here held, that if defendant has so large a fraction of the market as to constitute a "predominant" share, a rebuttable presumption of monopolization follows. The fraction depends upon the denominator (the "market") as well as the numerator (the defendants' volume). Clearly, this "presumption" is unwarranted unless the "market" is defined to include all competitors. The con-

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[7] *Tampa Electric Co. v. Nashville Coal Co.*, 365 U. S., at 327.

[8] The example used by the court in its findings is illuminating and disturbing. In explanation of its narrow market definition, the court says that the difference between the accredited central station protective services and all others "could be compared" to the difference between a compact six-cylinder car and a chauffeur-driven sedan. It is probably true that the degree of direct competition between luxury automobiles and compacts is slight. But it is by no means as clear-cut as the trial court seems to suggest. The question would require careful analysis in light of the total facts and issues. For example, if the antitrust problem at hand involved an acquisition of the business of a manufacturer of compacts by a maker of luxury cars, it is by no means inconceivable that sufficient competitive overlap would be found to place both products in the "relevant market."

trary is not supported by this Court's decisions in either the *Cellophane Case, supra,* or *United States* v. *du Pont & Co.* (*General Motors*), 353 U. S. 586. The latter case defined the market in terms of the *total* products which could be used for the defined purposes: automobile fabrics and finishes. This embraces the total range of options for customers seeking these products. On the contrary, as the record here shows and as the findings, candidly read, imply, substantial options exist for services other than through accredited central stations providing protective services. Those options, whether for all or a part of the services in issue, must be included in the assessment of the market.

In the opinion which this Court hands down today, there is considerable discussion of defendants' argument that the market should be "broken down" by different type of service: *e. g.,* burglar protection, fire protection, etc. The Court rejects this on the ground that it is appropriate to evaluate a "cluster" of services as such. It points to *Philadelphia Nat. Bank, supra,* for support for its approach. In that case, MR. JUSTICE BRENNAN'S opinion for the Court carefully set out the distinctive characteristics of banking services: that some of these services (*e. g.,* checking accounts) are virtually free of competition from other types of institutions, and that other services are distinctive in cost or other characteristics. 374 U. S., at 356–357. See also *United States* v. *First Nat. Bank,* 376 U. S. 665, 668 (per DOUGLAS, J.). Similarly, in *United States* v. *Paramount Pictures,* 334 U. S. 131, and *International Boxing Club* v. *United States,* 358 U. S. 242, 249–252, "first-run" moving pictures and championship boxing matches were held sufficiently distinctive in terms of demand in the market place to warrant consideration as separate markets.

But no such distinctiveness exists here. As I have discussed, neither this record nor the trial court's findings

show either a distinctive demand or a separable market for "insurance accredited central station protective services." The contrary is evident. None of the services furnished by accredited central stations is unique, as I have discussed. Nor is there even a common or predominant "cluster" of services offered by the central stations. One of the defendants, Holmes, is engaged only in the burglary alarm business. Another, AFA, furnishes only fire and waterflow service. Only ADT among the defendants makes available to its customers the full "cluster."

I do not mean to suggest that the Government must prove its case, service by service. But in defining the market, individual services, even if furnished in isolation, ought to be specified and have, as distinguished from the conclusion impelled by the circumstances in *Philadelphia Nat. Bank, supra,* competitors for individual services ought to be taken into account.

I do not intend by any of the foregoing to suggest that, on this record, the relief granted by the trial court and the substantially more drastic relief ordered by this Court would necessarily be unjustified. It is entirely possible that monopoly or attempt to monopolize may be found—and perhaps found with greater force—in local situations. Relief on a pervasive, system-wide, national basis might follow, as decreed by the trial court, as well as divestiture in appropriate local situations, as directed by this Court. It is impossible, I submit, to make these judgments on the findings before us because of the distortion due to an incorrect and unreal definition of the "relevant market." Now, because of this Court's mandate, the market-by-market inquiry must begin for purposes of the decree. But this should have been the foundation of judgment, not its superimposed conclusion. This inquiry should—in my opinion, it must—take into account the *total* economic situation—all of the options available to one seek-

ing protection services. It should not be limited to central stations, and certainly not to "insurance accredited central station protective services" which this Court sanctions as the relevant market. Since I am of the opinion that defendants and the courts are entitled to a reappraisal of the liability consequences as well as the appropriate provisions of the decree on the basis of a sound definition of the market, I would reverse and remand for these purposes.